

No. 48112-0

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SHAWN M. TILLERY, Appellant

SUPPLEMENTAL BRIEF OF APPELLANT

PO Box 829
Graham, WA
253-445-7920

Marie J. Trombley, No. 41410
Attorney for Appellant

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I. Assignments of Error

A. The Trial Court Failed To Enter Written Findings of fact and Conclusions of law for Imposition Of An Exceptional Sentence, Requiring Remand And Entry.

B. This Court Should Not Impose Costs On Appeal.

Issue Pertaining to Assignment of Error

1. Oral findings made on the record by a trial court in support of an exceptional sentence does not satisfy the requirement of written findings of fact and conclusions of law. Must the matter be remanded to the trial court for entry of written findings of fact and conclusions of law, with opportunity for Mr. Tillery to address the merits of the trial court's written findings and conclusions on appeal?

2. Should an appellate court impose costs on appeal if an indigent appellant does not have a present or future ability to pay those costs?

II. Statement of the Case

Mr. Tillery incorporates by reference the facts presented in his opening brief and adds the following.

Mr. Tillery was convicted of second-degree assault with two aggravating factors and a residential burglary. CP 140-141;154-155. At sentencing, the trial court made an oral ruling of an exceptional sentence, but did not enter written findings of fact and conclusions of law. (Vol. 9 RP 17-18).

The trial court also noted that Mr. Tillery's future ability to pay legal financial obligations was going to be limited. (Vol. 9 RP 20). Per the judgment and sentences, the discretionary fees were waived and he was obligated to a total of \$1500, at \$30 per month, beginning 180 days after his release from incarceration. CP 143; 154-155. Mr. Tillery gave notice of intent to appeal and made a motion and declaration of indigency. Supp. CP. In the affidavit, he listed no assets, no vehicle, and averred that he was unemployed and had been in confinement since March 2014. Supp. CP. The court granted the order of indigency. CP 197-198.

III. Argument

A. The Trial Court Erred When It Failed To Enter Written Findings To Support An Exceptional Sentence.

If a jury finds, unanimously and beyond a reasonable doubt, facts alleged by the State in support of an aggravated sentence, the court may impose a sentence that exceeds the standard range, if it determines that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6).

Whenever a sentence outside the standard range is imposed, the trial court is required to set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts...and the public of the reasons for deviating from the standard range." *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). This Court reviews whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling, using a de novo standard. *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454, *rev. denied*, 171 Wn.2d 1024 (2011).

Here, the trial court did not enter any written findings of fact or conclusions of law. By failing to make the written required

findings, the trial court neglected to fulfill its statutory obligation under RCW 9.94A.535; *State v. Friedlund*, 182 Wn.2d 388, 395, 341 P.3d 280 (2015).

The remedy for failure to enter written findings of fact and conclusions of law is to remand the case for entry of those findings and conclusions. *Friedlund*, 182 Wn.2d at 395. Mr. Tillery respectfully asks this Court to remand for entry of the written findings, based only on evidence already taken. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). Further, because RCW 9.94A.585(2) grants a defendant the right to appeal any exceptional sentence to the Court of Appeals, this Court should allow for any necessary supplemental briefing. *State v. Hale*, 146 Wn.App. 299, 306, 189 P.3d 829 (2008); *Friedlund*, 182 Wn.2d at 396. As the *Friedlund* Court held, to do otherwise would be to deprive a defendant of his right to appeal. *Id.*

B. This Court Should Not Impose Appellate Costs.

The trial court found Mr. Tillery indigent, without assests, unemployed, and unable to pay for the expenses of appellate review. The court found he was entitled to the appointment of appellate counsel at public expense.

Under RAP 14.2, the State may request the Court to order an appellant to pay appellate costs if the State substantially prevails. The rule provides that a “commissioner or clerk of the appellate court *will* award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. RAP 14.2. Unlike a commissioner clerk, the appellate Court is authorized to exercise its discretion to award or deny appellate costs, even if the State substantially prevails on appeal. RCW 10.73.160(1)¹; *State v. Sinclair*, 192 Wn.App. 380, 382, 367 P.3d 612 (2016).

In *Sinclair*, Division One concluded that rather than remanding to the trial court to determine ability to pay, it “is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *Sinclair*, 192 Wn.App. at 390.

If, as here, an appellant is indigent and lacks the ability to pay, the appellate court should deny an award of costs to the State. The ramifications of legal financial obligations on indigent

¹ “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added).

individuals, such as increased difficulty in reentering society, the doubtful recoupment of the money by the government, the extended jurisdiction of the court on individuals, and the inequities in administration were addressed in both *Blazina* and *Sinclair*. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *Sinclair*, 192 Wn.App. at 391.

At sentencing in this case, the trial court acknowledged that paying legal financial obligations would not be impossible, but certainly very difficult for Mr. Tillery. The court only imposed the statutory obligations and authorized his appeal *in forma pauperis*. Given his lack of assets, unemployment, 48 month prison sentence, and obligation to provide for his child, it is unrealistic to believe he would be able to pay appellate costs without financially crippling him for many years. Mr. Tillery respectfully asks this court to exercise its discretion to reach a just and equitable result and direct that no appellate costs should be awarded should the State substantially prevail on appeal.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Tillery respectfully asks this Court to remand for entry of written findings of

fact and conclusions of law, allowing for supplemental briefing as necessary. He also respectfully requests that this Court exercise its discretion and not impose costs on appeal should the State substantially prevail.

Dated this 30th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for SHAWN TILLERY do hereby
certify under penalty of perjury under the laws of the United States
and the State of Washington, of appellant's supplemental brief was
sent by first class mail, postage prepaid on JUNE 30, 2016 to:

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